

1-1-1996

# Reassessing Canonical Attitudes Towards African Marriage Practices Based on a Study of the African Synod

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# Reassessing Canonical Attitudes Towards African Marriage Practices:

Based on a Study of the African Synod

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*African theologians are virtually unanimous in pointing out that the experience and institution of marriage constitute a special test case for the process of inculturation in the Church in Africa. This article studies the problem as it was dealt with by the African Synod, that is, from the perspective of the Code of Canon Law in relation to extremely important issues such as grounds for nullity, consummation of marriage and marital consent. In the author's opinion the Synod opens the way for further discussion and examination of the issues involved rather than provide practical solutions. The pastoral problem of compatibility of canonical attitudes with African marriage practices remains an open question.*

## Introduction

It has been argued that the African Church needs a "Canon Law" to cater for its specific needs, especially in this period of precipitated transformation of the socio-cultural and religious contexts in which efforts of inculturation currently take place. The peculiarities of some elements of the African cultural life which Christianity seeks to dialogue with in a sustainable process of inculturation are striking as well as challenging. One such element is the institution of marriage. It is no exaggeration to say that this institution is pivotal in the socioeconomic, religious, and cultural organisation of the lives of Africans.

The *Special Assembly of the Synod of Bishops for Africa*, held in Rome in 1994 to lay out a plan for the evangelising mission of the African Church on the eve of the third millennium, was aware of the importance of addressing "with urgency and dispatch"<sup>1</sup> issues concerning African marriage practices

<sup>1</sup> Intervention of Bishop Michael Cleary, C.S.Sp. in *Bulletin of the Holy See Press Office*, n.9.; Cf. John Paul II, *Ecclesia in Africa* Post-Synodal Apostolic Exhortation (Nairobi: Paulines Publications Africa, 1995), n.50.

from the perspective of the matrimonial jurisprudence of the Church.

While the Synod did not go as far as proposing the promulgation of an African Canon Law of Marriage, the Synodal Fathers did call for "a radical reassessment of our pastoral and canonical attitude towards some African marriage practices like the role of the extended family in marriage consent, barrenness as possible grounds for nullity, marriage by stages and the practice of Levirate marriage or inheritance of widows."<sup>2</sup> In addition, Cardinal Hyacinth Thiandoum did assert that, in the context of inculturation, an African rite is a right and not a concession.<sup>3</sup> One could argue that an African rite includes, among other things, an African Code of Canon Law.

It is my aim in this essay to examine briefly through a close study of available synodal documents those areas where canonical attitudes need to be reassessed. It must be stressed that to reassess canonical attitudes as the Synodal Fathers did instead of calling for the promulgation of an African Canon Law of Marriage is something short of my initial expectation. We must allow for the possibility that such an innovation may not as yet be necessary.

Within the framework of what was discussed at the Synod, I begin by outlining briefly the problem which necessitates the above-mentioned reassessment and what a possible harmonisation of the African marriage practices with canonical prescriptions would entail. In the second section, I deal with three specific areas (sterility, consummation and consent) where such reassessment and harmonisation are needed. It does not fall within the purview of this essay to study the institution of marriage in Africa. Only those aspects will be mentioned which were of particular interest to the Synodal Fathers.

## 1. The Problem

Undoubtedly, the problem is first and foremost a pastoral one. It is succinctly expressed in the *Working Document* of the Synod: "There are a great number of Catholics excluded from the sacraments, the source of unity and strength, by reason of their irregular marital situa-

<sup>2</sup> *Relatio Post Disceplationem (RPD)* (Vatican: Libreria Editrice Vaticana, 1994), n.21; See also the interventions of Bishop Tharcisse Tshibangu Tshishiku in *Bulletin*, n.12, and Archbishop Vincenzo Fagiolo in *Bulletin*, n.14.

<sup>3</sup> *Relatio Ante Disceplationem (RAD)* (Vatican: Libreria Editrice Vaticana, 1994), n.17.

tion.”<sup>4</sup> Upon a closer examination the canonical ramifications of this problem become evident. Precisely, this exclusion of Catholics from the sacraments stems from the fact that the above-mentioned irregularity concerns marital unions which are considered to be non-acceptable, that is, uncanonical, for reasons relating to form of consent, ratification and consummation.<sup>5</sup> Simply put, it concerns marriage contracted “in a form not recognised by the Church.”<sup>6</sup>

As I shall argue later in this essay, these problems are deeply connected with the cultural understanding of marriage by Africans in general –Christians and non-Christians. Hence, it is hardly surprising that practically all the interventions and deliberations of the Synodal Fathers concerning marriage were set in the context of inculturation even when there is a strong canonical ring to them. And for this reason any solution proposed must be sensitive to the pastoral and cultural situation of African Christians.

## 2. Harmonisation

Although the Synodal Fathers approached the problem from the perspective of inculturation, there was a noticeable shift of emphasis to the connected notion of harmonisation. As the Fathers affirm: “We need greater appreciation for our customary laws of marriage and serious efforts to harmonise them with Church law on marriage.”<sup>7</sup> One could argue that the thrusts of these two approaches, inculturation and harmonisation, are different. In my opinion they are not. Rather than draw a strict line of distinction between both, it is perhaps helpful to see harmonisation as one facet of the process of inculturating African marriage practices.

Harmonisation concerns primarily the essential dialogue that must exist between Christian marriage, as detailed in and regulated by Canon Law, and African marriage practices as experienced by African Christians.<sup>8</sup> Already, as

<sup>4</sup> *Instrumentum Laboris (I.L.)*, (Vatican: Libreria Editrice Vaticana, 1993), n.68. This problem found resounding echo in many of the interventions at the Synod. See, for example, the interventions of Bishops John O’Riordan, C.S.Sp. in *Bulletin*, n.20; Raphael Mwana’a Nzeki Ndingi in *Bulletin*, n.13; Archbishops Luc Sangare in *Bulletin*, n.20; Paul Verdzekov in *Bulletin*, n.34; Report of Discussion Group (Anglicus B) in *Bulletin*, n.29.

<sup>5</sup> See *RPD*, nn.6 and 21; *Elenchus Unicus Propositionum* (Vatican: Libreria Editrice Vaticana, 1994), n.33.

<sup>6</sup> *Elenchus Finalis Propositionum* (Vatican: Libreria Editrice Vaticana, 1990), n.35.

<sup>7</sup> *RAD*, n.17; cf. *RPD*, n.6.

<sup>8</sup> Cf. Interventions of Bishop Cleary in *Bulletin*, n.9; Archbishop Sangare in *Bulletin*, n.20; Bishop Victor Tonye Bakot in *Bulletin*, n.13. Harmonisation also concerns the need to avoid “triple celebration of marriage by the same couple –customary, civil and Church marriage in the presence of a priest.” *RPD*, n.6; cf. Archbishop Sangare, *ibid* and Bishop Bakot, *ibid*.



some of the Synodal Fathers point out, “a clear dichotomy” exists between African cultural understanding and practice of marriage and canonical regulations.<sup>9</sup> In this context, then, the aim of harmonisation is to produce an “*African* Christian marriage,”<sup>10</sup> without neglecting what the Synodal Fathers recognise as the two principles of inculturation: compatibility with the tenets of the gospel and communion with the universal Church.<sup>11</sup>

At this point it is reasonable to ask: What are those areas where harmonisation is needed? I will mention three, which, I believe, are illustrative of a broader spectrum of reassessment of canonical attitudes towards African marriage practices. My treatment of these areas presupposes –as does that of the Synodal Fathers<sup>12</sup>– the essential elements and properties of marriage, namely, mutual exchange of *consent* (can. 1057; cf. can. 1095 ff), *unity* of both spouses and *indissolubility* of the marital bond (can. 1056).

*2.1. Grounds for Nullity: Sterility:* The canonical legislation on grounds for nullity, understood as a declaration of the non-existence of a supposed sacramental marital bond, clearly excludes sterility as a ground for invalidating marriage (can. 1084, n.3), being inconsequential to the sexual act needed for the consummation of the marital consent (can. 1061, nn.1 and 2; cf. can. 1141). This question constitutes the most problematic area in the inculturation of African marriage practices, precisely because it touches upon certain profound cultural assumptions and societal expectations that have been coarsened into a widely accepted rule of African marriage practices.

The situation is this: “The African loves children, who are joyfully welcomed as gifts of God.”<sup>13</sup> And, generally, in Africa, childless marriages are considered unsuccessful, and this “poses great problems for unity and indissolubility where a Catholic married couple has no children.”<sup>14</sup> In the face of this conflict of marriage norms, African *versus* Canon (Church) Law, one of the proposals that surfaced at the Synod was “that sterility should be proposed as an invalidating factor in African marriage.”<sup>15</sup> Expectedly, this proposal generated a contrary view by the “majority” of the Synodal Fathers.

<sup>9</sup> Cf. Bishop Ndingi in *Bulletin*, n.13; Archbishop Frederic Etsou, C.I.C.M. in *Bulletin*, n.14.

<sup>10</sup> Intervention of Bishop J.E. Ukpo in *Bulletin*, n.9. My italic.

<sup>11</sup> This was recognised in the Reports of all the Discussion Groups. See *Bulletins*, nn.29, 30, 31, 32.

<sup>12</sup> See, for example, the interventions of Bishop E.S. Obot in *Bulletin*, n.7; Archbishop Fagiolo in *Bulletin*, n.14; *Ecclesia in Africa*, n.83.

<sup>13</sup> *Ecclesia in Africa*, n.43.

<sup>14</sup> Intervention of Archbishop Verdzev in *Bulletin*, n.34.

<sup>15</sup> Report of Discussion Group (*Anglicus*) C in *Bulletin*, n.29.

From a close examination of the synodal documents one discovers that there are persuasive arguments in favour of both positions. Let us examine them briefly.

First, in favour of sterility as a ground for invalidating African marriage. It seems incontestable that "the African considers offspring as an essential aspect of marriage,"<sup>16</sup> to the extent that it constitutes a vital criterion for determining, as mentioned above, the success (or failure) of marriage. It would appear inconceivable to expect a "stable" marital relationship in Africa if such union is devoid of fecundity understood as procreation.<sup>17</sup> The inflexibility of Canon Law on the indissolubility of marriage on the grounds of sterility leads, therefore, to a "growing fear among young people."<sup>18</sup> It is the fear of committing oneself to an indissoluble marriage before fecundity has been proved through conception and birth.

The implication of the foregoing extends further to the whole area of polygamy. The connection between this question and polygamy resides in the fact that "a good number of polygamous unions by Christians are traceable to the sterility of the first wife."<sup>19</sup> Taken together these considerations provide a strong case for the acceptance of sterility as a possible ground for the dissolution of African marriage. But there are arguments in favour of the contrary view.

The force, if any, of the argument of sterility of the first wife as the cause of subsequent polygamous union dwindles considerably when one recalls – as it has been proved beyond doubt – that "it is not always that the woman is responsible for childlessness."<sup>20</sup> It will therefore be unjust to attribute sterility to the woman. However, this is not a serious refutation, because what we are concerned with here is the sterility that is traceable to *either* of the two spouses.

The second contrary argument could be termed 'argument from tradition': "It is most evident that monogamy was the original type of marriage in Africa, and even today, references to second and third wives in many African Societies do regard them as necessary evils (*sic*), consequent upon unfortunate situations of married life."<sup>21</sup> Suffice it to mention here that the evidence

<sup>16</sup> *Anglicus C* in *Bulletin*, n.29.

<sup>17</sup> Cf. Report of Discussion Group (*Gallicus*) E in *Bulletin*, n.31.

<sup>18</sup> *Anglicus B* in *Bulletin*, n.29.

<sup>19</sup> *Anglicus C* in *Bulletin* n.29; cf. Archbishop Sangare in *Bulletin*, n.20.

<sup>20</sup> *Anglicus C* in *Bulletin*, n.29.

<sup>21</sup> *Anglicus C* in *Bulletin*, n.29; cf. *Anglicus B* in *Bulletin*, n.29; and the intervention of Bishop Peter K. Sarpong in *Bulletin*, n.10.

for monogamy as the *original* type of marriage in Africa is arguable. It is thus something to be examined, not merely assumed.

Even though –as I hold– arguments for accepting sterility as a canonical ground for the dissolution of the marriage bond have a strong appeal to the African mentality and sensitivity, the final option of the Synodal Fathers is for the monogamous dimension and indissolubility of African marriage in the case of childlessness.<sup>22</sup>

*2.2. Consummation of Marriage:* Although this question is intimately connected with the foregoing considerations, this notion of consummation warrants a separate treatment because of the peculiar nature of its understanding detectable in African marriage practices.

The canonical dictum is that consent makes marriage (can. 1057). Further ground for indissolubility is provided by consummation which canonically means that “the spouses have in a human manner engaged together in a conjugal act in itself apt for the generation of offspring” (can. 1061, n.1; cf. can. 1141). What this presupposes is that the conjugal act of sexual union occurs after the exchange of consent (cf. can. 1061, n.2). Here lies the problem. In a number of African societies the sexual act precedes the exchange of consent, the aim being to verify the fecundity of the intended marital union. From this arises sometimes the phenomenon of “trial marriage” and certain aspects of the African understanding of marriage as a process which were frowned upon by some Synodal Fathers. The case of the Malian Bishops clearly illustrates this problem: “*Chez plusieurs de nos ethnies, c’est la naissance du premier enfant qui fait que le mariage est définitivement lié...*”<sup>23</sup> This African understanding of consummation ought, in the opinion of some Synodal Fathers, to be accorded canonical recognition (*la reconnaissance par le droit*) so as to become “*principe de justification de la grâce de dissolution au*

<sup>22</sup> *Elenchus Unicus Propositionum*, n.33; *Elenchus Finalis Propositionum*, n.35. The conclusion of the Fathers expressed here calls for a closer examination. One could object that the overarching framework of their approach is an outdated ecclesiology that accords a heavier weight to the juridical (Roman, at that!) than to human, experiential and communitarian elements. There are many difficulties with this approach and conception of Church. For one thing, it could be an unconscious but deeply ingrained substitution of authority in place of a radical openness to the Spirit on the part towards a new inculturation. The point at issue here is serious: it verges on a substitution of the law for the gospel –compatibility with the gospel is easily construed as compatibility with the existing universal laws of the Church. On this point, I submit, the issue of inculturation should either be taken seriously, that is, radically, or totally abandoned.

<sup>23</sup> Archbishop Sangare in *Bulletin*, n.20.



titre d'un 'marriage ratifié et non consommé'." (cf. can. 1142).<sup>24</sup> Some important consequences follow for the application of Canon Law on marriage in Africa.

Just as marriage, canonically speaking, is not consummated if conjugal union has not been effected *humano modo* (can. 1061, n.1), it should be possible –as some of the Synodal Fathers argue– to accept that in African socio-cultural contexts, marriage is not *consummated* if the woman has not given birth to a child. In Africa, it is not uncommon to admit that "the birth of a child marked the 'consummation' of marriage. Once a child has been born, the marriage is indissoluble.... 'Children became a real external sign of this indissoluble unity'."<sup>25</sup> Furthermore, in accordance with certain African customs, a woman attains the status of 'wife' only after the birth of her first child. Before that both spouses are considered to be living in concubinage.<sup>26</sup>

The advantage of this argument lies in the fact that it adjusts slightly the present canonical understanding of consummation which lays a lot of emphasis on the punctual act of physical intercourse as the essential ingredient for establishing an indissoluble bond. In this alternative African perspective, the notion of consummation is broadened and it takes into consideration authentic cultural values, such as the notion of marriage as a gradual process leading to the attainment of a prescribed status in the community. Besides, it expresses better the meaning of conjugal union within the total conception of marriage as a life-long partnership of love and life (cf. can. 1055). It avoids, finally, tensions which might stem from a rigid conception of the indissolubility of marriage.

However, since this consideration is closely linked to the question of sterility as ground for dissolution, it is to be expected that it did not meet with the approval of the Synodal Fathers.

2.3. *Consent*: There are valid reasons for thinking that the current canonical emphasis on consent as the decisive moment of marriage owes its origin to the canonization of Roman Law by the Church.<sup>27</sup> It is canonically admitted that consent makes marriage (can. 1057). This again poses a problem for African marriage practices on several counts.

<sup>24</sup> Archbishop Sangare in *Bulletin*, n.20.

<sup>25</sup> Archbishop Verdzekov in *Bulletin*, n.34.

<sup>26</sup> Archbishop Sangare in *Bulletin*, n.20. Similarly, the man attains the status of 'husband' after the birth of his first child.

<sup>27</sup> Cf. Bishop Ndingi in *Bulletin*, n.13.



First, in Africa, consent is not the exclusive exchange between individual spouses. It involves the "*Grande Famille*," whose role is indispensable for the stability of marriage.<sup>28</sup> From this arises the desirability of making canonical provision—which at present only recognises the individual rights of spouses—for the consent of the "*Grande Famille*" as essential to African Christian marriage.

Second, current canonical provision tends to lend itself to a narrow understanding of the exchange of consent (which makes marriage) as a single moment of an instant individual act. But as recognised by the Synodal Fathers, African marriage practices conceive the exchange of marital consent as a step in a "process," oft-times very elaborate. The reference here is not necessarily to the practice of "trial marriage" but rather to the African conception of marriage as a gradual "initiation" into a definitive and irrevocable mutual commitment of both spouses, their families and the entire community.<sup>29</sup> This process is marked by successive stages (introduction, familiarisation of spouses and their families, exchange of gifts, declaration of consent....) which are ritually celebrated.

It seems, therefore, that the canonical recognition of these stages of marriage will not only advance the crucial dialogue between African traditional marriage and Church marriage, but, more importantly, it would also provide a favourable context for the understanding of marriage as a life-long commitment requiring a long process of formation geared towards mature and authentic Christian commitment. It is in the light of the foregoing that one can adequately appreciate the importance of Bishop Ndingi's proposal of "the possibility of recognizing, under certain conditions, the traditional marriage as a valid form of marriage among Christians...." In this case it is possible that "the priests and the witnesses" would be present not only "for the ceremony/ies considered to be expressing marriage consent,"<sup>30</sup> but at all the other stages of the marriage process. This proposal does not require only a canonical adjustment; it also provides a pastoral solution to the situation of many African Christians "so that this inculturation of the Christian faith may come about ever more extensively in the context of marriage and the family as well as in other fields."<sup>31</sup>

<sup>28</sup> Archbishop Sangare in *Bulletin*, n.20.

<sup>29</sup> Archbishops Sangare in *Bulletin*, n.20; Etsou in *Bulletin*, n.14; and Bishop Ndingi in *Bulletin*, n.13. John Paul II hints at the same point in *Ecclesia in Africa*, n.85.

<sup>30</sup> *Anglicus E* in *Bulletin*, n.30.

<sup>31</sup> *I.L.*, n.60.

## Conclusion

The foregoing enquiry has been an attempt to broach some aspects of the problem posed by African marriage practices from a canonical standpoint based on the deliberations and proposals of the African Synod. Understandably, "the Christian ideal of marriage is a problem for every culture,"<sup>32</sup> African cultures not excepted. The attempt to address specific areas of this problem by the Synodal Fathers merely opens up new perspectives for further examination of the issues involved rather than resolve these issues. That is why, perhaps, the Synodal Fathers unanimously resolved to propose the creation of "commissions on Marriage in Africa"<sup>33</sup> at the level of Episcopal Conferences to study the issues involved from the different perspectives, including that of Canon Law.

However, it must be stressed that the issue is primarily pastoral. Any reassessment of canonical attitudes and legislations will remain ineffective without a corporate pastoral initiative. Such initiative will involve a strong catechesis and formation in the Christian vocation and life of marriage. It will also involve a sincere and open dialogue with African traditional religions and cultures which form the framework of the African understanding and experience of marriage. But here we must avoid uncritical assumptions. The argument, for example, that "*most* African cultures ideally uphold the *same* essential properties of marriage (unity and indissolubility)"<sup>34</sup> needs to be advanced and treated with caution. That indissolubility of marriage is a value in African marriage practices may well be true, but –and this is the point– the force of such value is considerably mitigated by particular situations created, for example, by barrenness and sterility. It is such situations that the genuine reassessment of our canonical attitudes towards African marriage practices is called upon to address.

<sup>32</sup> RPD., n.21.

<sup>33</sup> *Elenchus Finalis Propositionum*, n.35; *Ecclesia in Africa*, n.64. It is important to remark here that unfortunately the passing references in this latter document to the problems raised by African marriage practices for inculturation do not represent adequately the depth and extent at which these problems were discussed by the Synodal Fathers.

<sup>34</sup> *Elenchus Finalis Propositionum*, n.35; my italics.

### Documents of the African Synod Used for this Study

- \* *Lineamenta* (Vatican: Libreria Editrice Vaticana, 1990).
- \* *Instrumentum Laboris* (Vatican: Libreria Editrice Vaticana, 1993).
- \* *Relatio Secretarii Generalis de Praeparatione Synodi, 1989-1994* (Vatican: Libreria Editrice Vaticana, 1994).
- \* *Relatio Ante Disceputationem* (Vatican: Libreria Editrice Vaticana, 1994).
- \* Interventions of the Synodal Fathers in *Bulletins of the Holy See Press Office*, nn. 6-23.
- \* Interventions of the Auditors in *Bulletins of the Holy See Press Office*, nn. 10, 18, 22, 23.
- \* *Relatio Post Disceputationem* (Vatican: Libreria Editrice Vaticana, 1994).
- \* *Relationes Circulorum Minorum* in *Bulletins of the Holy See Press Office*, nn. 29, 30, 31, 32.
- \* *Elenchus Unicus Propositionum* (Vatican: Libreria Editrice Vaticana, 1994).
- \* *Elenchus Finalis Propositionum* (Reserved Document Presented to the Holy Father).
- \* *Nuntius* (Vatican: Libreria Editrice Vaticana, 1994).
- \* John Paul II *Ecclesia in Africa* Post-Synodal Apostolic Exhortation (Nairobi: Paulines Publications Africa, 1995).